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No. 95-181

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

UNION UNDERWEAR COMPANY, INC.,
d/b/a FRUIT OF THE LOOM - - - - Petitioner

versus

MARY KAY SCEARCE;
THOMAS A. DOCKTER, Administrative
Law Judge; and
WORKER'S COMPENSATION BOARD - Respondents

On Petition for a Writ of Certiorari
to the Supreme Court of Kentucky

RESPONDENT MARY KAY SCEARCE'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The question here presented is when a party presents a physician's report as evidence in an adversarial administrative proceeding for Workers' Compensation benefits, does procedural due process require the party presenting the evidence to schedule a deposition of the physician for cross-examination by the adverse party and pay the cost thereof.[1]

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[1]At the time this case was practiced no statute or regulation authorized payment of a witness fee to any witness appearing and testifying at a civil trial or by deposition. Effective March 6, 1995, 803 Ky. Admin. Regs. 25:160 §3 was promulgated permitting medical providers to charge up to $250.00 for the first half-hour and up to $100.00 for each quarter-hour thereafter for time spent in testifying. Until March 6, 1995 the only charge authorized to be made for testifying at a deposition was the reporter's fee for transcribing testimony.

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IN THE

SUPREME COURT OF THE UNITED STATES

UNION UNDERWEAR COMPANY, INC.,
d/b/a FRUIT OF THE LOOM - - - - - *Petitioner*

v.

MARY KAY SCEARCE;
THOMAS A. DOCKTER, Administrative Law Judge; and
WORKER'S COMPENSATION BOARD - - - *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

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RESPONDENT MARY KAY SCEARCE'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Kentucky Workers' Compensation cases are governed by Ky. Rev. Stat. Ann. §§342.0011 et. seq., (Michie/Bobb's-Merrill 1993 and Supp. 1994). Ky. Rev. Stat. Ann. §342.260(1) and (2) (Michie/Bobb's Merrill 1993 and Supp. 1994) at the time this case was practiced provided that the Workers' Compensation Board may promulgate administrative regulations for carrying out the provisions of the Act, and processes and procedures should be as

summary and simple as reasonably possible.[2] The board or any member thereof or any administrative law judge may subpoena witnesses. Ky. Rev. Stat. Ann. §342.260(3) and (4) (Michie/Bobb's-Merrill 1993 and Supp. 1994) provides that the sheriff shall serve all subpoenas of the board and administrative law judge and the Circuit Court shall, on application of the board, any member thereof, or any administrative law judge, enforce the attendance and testimony of witnesses and the production and examination of books, papers and records.

This case was practiced under the procedure prescribed by 803 Ky. Admin. Regs. 25:011 since the regulations, Ky. Admin. Regs. 803 KAR 25:010 did not become effective until June 15, 1995 and citations in the Petition for Writ of Certiorari to that regulation are therefore inapplicable.

The regulation promulgated to implement Ky. Rev. Stat. Ann. §342.033 (Michie/Bobb's-Merrill 1993 and Supp. 1994) is Ky. Admin. Regs. 803 KAR 25:011, Section 13 which provides:

> (7) Any party may file, with notice to the other parties, the testimony of three (3) physicians, taken either by deposition or medical report, which shall be admitted into evidence without further order. If any party objects to the admissibility of the evidence, the administrative law judge shall then rule on its admissibility.
>
> (8) All other written medical reports shall be introduced by motion for admission. The written medical report shall be attached to the motion. The party seeking admission of the report shall also file a memo-

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[2] By amendment effective April 4, 1994 the Kentucky Legislature amended Ky. Rev. Stat. Ann. §342.260(1) (Michie/Bobb's-Merrill 1993 and Supp. 1994) to transfer from the Board to the Commissioner the duty of preparing administrative regulations.

> randum in support of the motion. The administrative law judge shall rule on the motion for admission within fifteen (15) days of the filing of the motion.
>
> (9) Any objection to the filing of a written medical report shall be filed within ten (10) days of the filing of the report or the motion for admission. Grounds for the objection shall be stated with particularity. The objecting party may file a memorandum in support of his objection.
>
> (10) If a written medical report is admitted as direct testimony, any adverse party may depose the physician making the written report as cross-examination concerning it and the deposition shall be filed as proof without a motion.

If the case proceeds to adjudication, all proof is by deposition or medical report except at the hearing the Plaintiff must appear and testify and any other proof not previously taken by deposition may be introduced pursuant to Ky. Admin. Regs. 803 KAR 25:011 Section 10(3).

Thus the usual claim for compensation benefits is decided upon written testimony together with the plaintiff's personal appearance and testimony before an administrative law judge with the absolute right to cross-examination of any witness, including any physician whose testimony was introduced by way of medical report.

ARGUMENT

The claim of the Petitioner here is not that it was denied due process because it had no right of cross-examination of a physician whose medical report was considered as evidence. The right of cross-examination is expressly provided for by the Kentucky Legislature in Ky. Rev. Stat. Ann. §342.033 and implemented by Ky. Admin. Regs. 803 KAR 25:011 Section 13(10). Therefore, so much of Petitioner's argument at pp. 12-22 of the Petition for Writ of Certiorari is inapplicable and irrelevant. The Kentucky Legislature

recognized that due process required the right of cross-examination which was granted and implemented by regulations. Petitioner's contention relates to which party should bear any cost associated with cross-examination by deposition of a physician whose medical report is introduced as evidence.

We would point out that prior to March 6, 1995 when the Commissioner established a fee schedule for physicians' testimony by Ky. Admin. Regs. 803 25:160, no witness in a civil trial nor a witness testifying by deposition was entitled to any fee.[3] Therefore, the only cost associated with the right of cross-examination of a physician whose report is introduced as evidence is the cost of transcription. A recalcitrant witness can be compelled to testify by the issuance and service of a subpoena issued by the board, any member thereof, or any administrative law judge, enforceable by contempt proceedings in the Circuit Court on failure to appear and testify. Ky. Rev. Stat. Ann. §342.260 (Michie/Bobb's-Merrill 1993 and Supp. 1994). As pointed out by the majority opinion of the Supreme Court of Kentucky, requiring the proponent introducing evidence by medical report to produce the physician for cross-examination and pay any expenses in connection therewith, would eliminate entirely the use of medical reports. The Court's opinion in *Union Underwear Company, Inc. d/b/a Fruit of the Loom* v. *Mary Kay Scearce et al*, 806 S.W. 2d 7 (Ky. 1995) recognized this saying at p. 9, id:

> If the claimant is required to produce, at claimant's expense, the physician for cross-examination, the introduction of medical reports as direct testimony under the provisions of KRS 342.033 will be eliminated.

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[3] A minor exception exists with respect to expert witnesses testifying on cross-examination for discovery of their opinions pursuant to Kentucky Civil Rule 26, similar to Federal Rule 26(b)(4)(C)(i).

Goldberg v. *Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011 (1970) is inapposite for the reason that it dealt with the necessity of an evidentiary hearing prior to termination of welfare benefits. The issue involved was an expansion of the definition of what constituted property within the confines of the necessity for due process. It essentially abandoned the distinction between those concepts historically viewed as rights entitled to due process, as contrasted with activities which were a privilege. The definition of property entitled to due process before any taking was expanded to embrace rights not historically considered to be property. Since it is conceded that in the present case due process is applicable, the question is what process is due.

In *Morrissey* v. *Brewer*, 408 U.S. 471, 181, 33 L. Ed. 2d 484, 494, 92 S. Ct. 2593 (1972) it is said with respect to the procedural due process required:

> Whether any procedural protections are due depends upon the extent to which an individual will be "condemned to suffer grievous loss." Joint Anti-Fascist Refugee Committee v. McGrath, 321 U.S. 123, 168, 95 L. Ed. 817, 852, 71 S.Ct. 624 (1951)(Frankfurter, J. concurring) quoted in Goldberg v. Kelly, 397 U.S. 254, 263, 25 L. Ed. 2d 287, 296, 90 Sp. Ct. 1011 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. Fuentes v. Sheven, 407 U.S. 67, 32 L. Ed. 2d 556, 92 Sp. Ct. 1983 (1972). Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as a particular situation demands. "[C]onsideration of what procedures due process may require under any given

> set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers' Union v. McElroy, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 1236, 81 S. Ct. 1743 (1961). To say that the concept of due process is flexible does not mean that judges are at large to apply to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

In *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33, 96 S. Ct. 893 (1976) Justice Powell identified the specific dictates of due process as requiring consideration of three factors:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the physical and administrative burdens that the additional or substitute procedural requirements would entail. See e.g., *Goldberg* v. *Kelly*, supra, at 263-271, 25 L. Ed. 2d 287 90 Sp. Ct. 1011.

In *Scearey* v. *Three Point Coal Co.*, 280 Ky. 68, 134 S.W. 2d 228 (1939) at 231 id, it is said:

> One of the cardinal purposes of the compensation act is to facilitate the hearing of those claims speedily and in an informal manner and in carrying out this purpose of the Act the Board is necessarily vested with authority to require proof to be taken promptly.

A further purpose is to provide a relatively inexpensive procedure for determination of the injured employee's claim.

In the present case, there is little or no danger that there will be any "grievous loss" if an adverse party must subpoena a physician and pay a reporter's cost of transcribing the cross-examination, or even presently of paying the physician's witness fee charge allowed by Ky. Admin. Regs. 803 KAR 25:160. Most certainly a claimant who desires to present his claim must introduce some medical evidence at his own cost, and any employer defending such claim must introduce medical evidence at his cost. The slight additional cost for cross-examining a physician on his medical report, when compared with the value of an award, falls in the category of de minimus non lex curat. The value of requiring a party to produce a physician for cross-examination at his expense is virtually nil, since cross-examination may be compelled under any circumstance, thus guaranteeing due process. Finally, the legislative intent is to provide a swift, expeditious and inexpensive method of adjudging claimant's rights to workers' compensation benefits.

As pointed out by the Supreme Court of Kentucky, requiring the party wishing to use the testimony of a physician by report to produce that physician for cross-examination at his expense would completely abolish the use of medical reports. If the party must, in any event, produce the physician for a deposition by the adverse party, he would be stupid to request a medical report from the physician and probably pay him for the same, if he is going to have to pay for a deposition subsequently. Thus the legislative intent of providing an expeditious and inexpensive method of producing medical testimony is thwarted.

It is noteworthy that in *Mathews* v. *Eldridge*, supra, the reliability and credibility of the witness is recognized with respect to medical reports used for the determination of whether Social Security disability benefits should be

terminated. Justice Powell writes at 424 U.S. 319, 344, 47 L. Ed. 2d 18, 38:

> By contrast, the decision whether to discontinue disability benefits will turn, in most cases upon "routine, standard, and unbiased medical reports by physician specialists." *Richardson* v. *Perales*, 402 U.S., at 404, 28 L. Ed. 2d 842, 91 S. Ct. 1320, concerning a subject whom they have personally examined. In Richardson the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." Id., at 405, 407, 28 L. Ed. 2d 842, 91 Sp. Ct. 1420. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decision maker, is substantially less in this context than in Goldberg.

Further, an award to a claimant under the Workers' Compensation Act is not set in stone. Ky. Rev. Stat. Ann. §342.205 (Michie/Bobb's-Merrill 1993 and Supp. 1994) provides for continued medical examination by the employer during the time for which compensation is claimed. Ky. Rev. Stat. Ann. §342.125 (Michie/Bobb's-Merrill 1993 and Supp. 1994) provides that an award may be re-opened at any time upon the showing of change of occupational disability, mistake or fraud or newly discovered evidence.

The procedural due process guaranteed by statutes and regulations in Kentucky Workers' Compensation cases provides the right of cross-examination and procedures to compel the testimony of the witness for such cross-examination. Petitioner's reliance upon *Bell* v. *Comm. of Kentucky*, 875 S.W. 2d 882 (Ky. 1994) is misplaced. That

case involved the attempt to introduce a medical report in a criminal trial which report was not authenticated, and in violation of the Sixth Amendment of the United States Constitution which provides an accused with the right to personal confrontation of prosecution witnesses. No party in a civil action has a right of personal confrontation of a witness.

A number of the cases from varying states deal with procedures vastly different from that in Kentucky. For example, in Arizona the Industrial Commission produces the evidence upon which it bases its decision and unless the witness is brought before the Commission at a hearing, there is no opportunity for the claimant to cross-examine the testimony. In Alaska, statutes require that any party desiring to take evidence by deposition must pay the cost of transportation, expense and per diem of a witness. The issue there was whether a witness who was called for cross-examination is the witness of the adverse party in which event that party must pay the statutory costs. While some states do require that a party produce a physician for cross-examination, this does not mean that procedural due process requires or mandates the adverse party to pay any costs of producing an adverse witness for cross-examination. Kentucky has seen fit not to require such production of a witness, it being against the intent of the legislature to provide a procedure as inexpensive and expeditious as possible for the determination of injured employees' claims.

CONCLUSION

It is respectfully submitted the Writ of Certiorari should be denied because the Kentucky Workers' Compensation Act in all respects provides procedural due process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of this Brief in Opposition were on the 24th day of August, 1995 placed in the U.S. Mail, postage pre-paid, addressed to David W. Anderson, Esq., Harned, Bachert & Denton, 324 East Tenth Avenue, P. O. Box 1270, Bowling Green, KY 42102-1270, counsel of record for Union Underwear Company, Inc., d/b/a Fruit of the Loom; to Hon. Thomas A. Dockter, Chestnut Center, 7th. Floor, 410 West Chestnut Street, Louisville, KY 40202; to Hon. Chris Gorman, P. O. Box 2000, Frankfort, KY 40602-2000, Attorney General of the Commonwealth of Kentucky; and to Hon. Walter W. Turner, Commissioner, Department of Workers' Claims, Perimeter Park West, Bldg. C., 1270 Louisville Road, Frankfort, KY 40601.

William A. Miller

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APPENDIX

RENDERED: FEBRUARY 16, 1995
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

93-SC-000865-WC

UNION UNDERWEAR COMPANY, INC.
d/b/a FRUIT OF THE LOOM - - - - - - *Plaintiffs*

v.

MARY KAY SCEARCE, WORKERS' COMPENSATION
BOARD - - - - - - - - - - - - *Appellee*

APPEAL FROM COURT OF APPEALS
NO. 92-CA-002648
(WORKERS' COMPENSATION BOARD NO. 89-000667)

OPINION OF THE COURT BY SPECIAL JUSTICE ROBERT E. GILLUM—AFFIRMING

Mary Kay Scearce (Scearce) quit school after the eighth grade and began working for the appellant at age sixteen (16). For twenty-one (21) years Scearce was a sewing machine operator, working eight to nine hours per day, six days a week, averaging Two Hundred (200%) percent of her production quota. The type of work Scearce performed required repetitive motion of her hands and arms.

In February, 1986, Scearce began experiencing pain in her right arm, shoulder and neck. Later she developed pain in her right wrist. The pain increased over time and Scearce was placed on temporary, total disability. She shortly returned to work as an examiner. However, as a result of continued pain Scarce was again placed on temporary, total disability. Thereafter, she filed this claim. Scearce testified that after she ceased working, her condition worsened, she was in constant pain, she could not

raise her arm, could not sleep and she experienced numbness and tingling in her right side.

The Administrative Law Judge (ALJ) entered an opinion and Award in favor of Scearce, finding that she had sustained a fifty percent (50%) permanent, partial, occupational disability. Appellant's Petition for Reconsideration was denied.

On appeal to the Workers, Compensation Board (the Board) the appellant asserted two arguments. First, appellant contends that there was insufficient evidence that Scearce's condition was work-related. Second, appellant argues that the use of the Form 107, as provided by KRS 342.033 and 803 KAR 25:011 _13, was constitutionally defective. The Board reversed the ALJ, basing its findings 'on appellant's first argument that there was no substantial evidence that Scearce's condition was caused by work.

The Court of Appeals reversed the Board, reinstating claimant's award of benefits.

The first issue before this Court is one of first impression.

I. IN A HEARING BEFORE AN ADMINISTRATIVE BODY IS IT A VIOLATION OF CONSTITUTIONAL DUE PROCESS TO REQUIRE THE PARTY DESIRING CROSS-EXAMINATION TO ASSUME THE COST OF CROSS-EXAMINATION?

In this action the claimant, Scearce, introduced three (3) medical reports pursuant to KRS 342.033 and the Kentucky Workers' Compensation Board Rules of Procedure, 803 KAR 25:011, §13. The appellant filed one (1) medical report under these 2 provisions, and chose to take its remaining medical proof by deposition. Appellant filed objections to the introduction of claimant's medical reports and demanded that the physicians be produced for the purpose of cross-examination. The Administrative Law Judge (ALJ) overruled the objections of appellant.

The primary purpose of the workers, compensation statute is the elimination of common-law actions for personal

injuries growing out of industrial operations. *Releford* v. *Eastern Coal Corp.*, 260 F.2d 447, cert. denied, 79 S.Ct. 797, 359 U.S. 958, 3 L.Ed.2d 765.

The purpose of the amended workers, compensation statute is to provide for the swift and inexpensive resolution of compensation claims. *See generally*, William Haynes, *Kentucky Jurisprudence* —Workers' Compensation, §1.4 (1986).

Appellant, in this case, was never denied the opportunity to cross-examine the claimant's physicians. 803 KAR 25:011 §13(10) expressly provides for cross-examination when it states:

> If a written medical report is admitted as direct testimony, any adverse party may depose the physician making the written report as cross-examination concerning it, and the deposition shall be filed as proof without a motion.

This rule applied equally to the claimant and the appellant in this case. The appellant chose not to incur the cost of cross-examination of claimant's physicians.

Administrative due process does require that cross-examination be guaranteed. *Kaelin* v. *City of Louisville*, Ky. , 643 S.W.2d 590 (1982). However, administrative due process does not require that the cost of cross-examination be borne by the proponent of the direct examination. There is no case law or statutory law within this jurisdiction which asserts that the cost of cross-examination must be borne by the proponent of the direct examination. under the provisions of KRS 342.033, either party is permitted to introduce direct testimony from a physician through a written medical report subject to cross-examination by the adverse party. If the claimant is required to produce, at claimant's expense, the physician for cross-examination, the introduction of medical reports as direct testimony under the provisions of KRS 342.033 would be eliminated. In each case the employer would demand the production of the physician at a deposition for cross-examination, and the claimant would not compound the cost by having the physician

prepare the written report and also appear for deposition. This would defeat the purpose of the amended workers, compensation statute of providing for the swift and inexpensive resolution of compensation claims.

II. WERE THE FINDINGS OF THE ALJ THAT THE INJURIES SUSTAINED BY SCEARCE WERE WORK RELATED SUPPORTED BY SUBSTANTIAL EVIDENCE?

The facts as to claimant's work history, as set out above, were part of the ALJ's findings of fact. In addition, the ALJ found that the existence of claimant's permanent functional impairment was supported by the report of three (3) physicians. The ALJ went on to find, "The diagnosis made by Dr. Kasdan of Accumulative Fatigue Disorder, which he indicated was a synonym for Overuse Syndrome or Repetitive Strain Disorder, lends further credence to the findings . . ."

The Workers' Compensation Board's opinion found that the uncontradicted opinion evidence that the claimant's condition was not work related could not be summarily cast aside by the trier of fact. Citing *Mengel* v. *Hawaiian Tropic Northwest and Central Distribution, Inc.*, Ky.App., 618 S.W.2d 184 (1981). The Court of Appeals went on to say in this case, that there are some situations in which a board (ALJ) will be upheld on review when the board (ALJ) had made findings contradicting the medical testimony *(Id.*, at 186).

When the Workers' Compensation Board reviews the findings of the ALJ, its review is restricted to a determination of whether the factual findings of the trier of fact was "clearly erroneous" *Hudson* v. *Owens*, Ky., 439 S.W.2d 565, 568 (1969). In addition, the Court of Appeals stated, "The medical evidence, although relevant and material, must be considered not as determinative but rather as a part of the totality of the circumstances upon which the board (ALJ) must make the factual determination. . . ." *(Id.*, at 569).

After reviewing the record, we find the findings of the ALJ were supported by substantial evidence; that is, evidence of substance and relevant consequence having the

fitness to induce conviction in the minds of reasonable men. *Smyzer* v. *B. F. Goodrich Chemical Company*, Ky., 474 S.W.2d 367, 369 (1971).

For the foregoing reasons the opinion of the Court of Appeals is affirmed.

Leibson, Reynolds, Spain and Wintersheimer, JJ., concur. Stephens, C.J., files a separate dissenting opinion in which Stumbo, J., joins. Lambert, J., not sitting.

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